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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 373

WALTER H. DUISBERG, PETITIONER

v.

JAMES E. MARKHAM, AS ALIEN PROPERTY CUSTODIAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The orders appealed from, issued by the district court without opinion, appear in the record (R. 14a, 154a). The opinion of the circuit court of appeals (R. 73) is reported in 149 F. (2d) 812.

JURISDICTION

The judgment of the circuit court of appeals was entered on May 25, 1945. The petition for writ of certiorari was filed on August 24, 1945. The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended.

STATUTE INVOLVED

The action herein was brought pursuant to Section 9 (a) of the Trading with the Enemy Act (40 Stat. 411, as amended by Section 301 of the First War Powers Act, 1941 (55 Stat. 839, 50 U. S. C. Appendix, § 616).

QUESTIONS PRESENTED

(1) Whether the district court abused its discretion in denying the petitioner a continuance from June 21, 1944, the date set for trial after prior delays, until the Fall Term which commenced in November.

(2) Whether the district court abused its discretion in dismissing the complaint with prejudice when the petitioner refused to proceed to trial after his application for a continuance was denied.

STATEMENT

By Vesting Order No. 33 (R. 52) [1] of June 30, 1942, the Alien Property Custodian of the United States, pursuant to Section 5 (b) of the Trading with the Enemy Act, as amended, and pursuant to Executive Order No. 9095 of March 11, 1942 (7 F. R. 1971), vested all of the outstanding shares of General Dyestuff Corporation upon the finding that they were "property of nationals of a foreign country" as defined in Executive Order No. 8389 (5 F. R. 1400, as amended, 6 F. R. 2897). The petitioner was the registered owner of 1,975 of the shares vested. On June 3, 1943 (R. 1a), he filed this action against the Custodian, seeking the return of the shares and damages for the alleged wrongful taking. After determination of a prelimi-

[1] Record references to the petitioner's appendix in the court below (designated by the petitioner herein as "Record Part I") are cited by the use of the letter (a) after the page number, since the pages in that appendix are so marked; record references to the respondent's appendix in the court below (designated by the petitioner herein as "Record Part II") are cited by page number alone.

nary motion testing the sufficiency of the complaint (R. 1a, 1–4), issue was joined on March 18, 1944, when the defendant filed his answer denying that the plaintiff was the beneficial owner of the stock (R. 1a, 9a). The case was listed on the trial calendar for the April 1944 Term (R. 1a) in accordance with the district court rules, and counsel were advised to answer the call on April 4, 1944 (R. 120a–121a). On that day the petitioner's counsel had the case marked "Ready, not before May 15, 1944" (R. 1a, 89a). During the latter part of April or early in May, the United States Attorney orally informed the petitioner's counsel that the Government planned to move the case for trial during the month of June (R. 25–26, 38, 89a). And in two letters to the petitioner's counsel dated May 19 and May 22 the United States Attorney stated his intention to move that the trial be set for June 12 (R. 4, 5). On May 26 the Clerk of the District Court advised counsel for both parties that the trial date had been set for June 19 (R. 7). On June 5, during the course of the argument on an interlocutory motion, the petitioner's counsel intimated for the first time that he could not be ready for trial on the date fixed (R. 22). Since a judge from a different district had been designated to hear the case, the senior district judge arranged for a hearing before Judge Smith to have a definite date fixed (R. 35). Judge Smith heard both parties fully on June 9, considered the petitioner's affidavits and extended the trial date two days to June 21 (R. 45). The court's order pro-

vided that the case would be dismissed with prejudice if the petitioner should not proceed at that time (R. 14a–15a).

On June 16 the petitioner filed a notice of motion to adjourn the trial of the case until the Fall Term (R. 18a). After a full hearing lasting most of two days (June 20–21) (R. 59a–144a), Judge Lederle denied the motion for a continuance (R. 142a, 143a, 153a), denied the petitioner's further motion to "discontinue without prejudice" (R. 139a, 143a), and upon being informed by the petitioner's counsel that he would not proceed with the trial, granted the respondent's motion to dismiss the complaint with prejudice (R. 141a, 143a, 154a).

Numerous reasons were assigned for the continuance. They included the claim that petitioner had been unaware until the eve of trial that the issue in the case was whether the beneficial owner of the stock was I. G. Farbenindustrie, A. G., of Germany (R. 27, 40, 49, 22a, 52a, 63a); that the petitioner's private secretary had undergone an operation for appendicitis on May 21 and that her presence was indispensable for the preparation of the trial (R. 23, 48, 23a, 77a); that the respondent's various motions had interfered with the petitioner's preparation for trial (R. 47, 23a, 51a, 68a); that there had been an extensive turn-over of attorneys in the office of the petitioner's trial counsel (R. 51, 26a, 69a); that the petitioner's trial counsel had spent much time in other court engagements and as counsel to a Congressional committee (R. 26a); and that necessary wit-

nesses had not yet been located and evidence was still to be obtained abroad (R. 52a, 24a, 77a). Both Judge Smith on June 9 and Judge Lederle on June 21 concluded that the petitioner had failed to justify the continuance sought (R. 45, 143a). And Judge Fake had notified the petitioner's counsel on May 29 that he "wouldn't permit" an adjournment until the Fall (R. 34).

Petitioner failed to seek any shorter continuance than the 140 days between June 21 and the Fall Term which began on November 7, and rejected the suggestion that the trial be commenced and an adjournment be taken in the course of the trial if the need for additional time for preparation should be established (R. 33).

On appeal, the circuit court of appeals affirmed the judgment of dismissal (R. 74).

ARGUMENT

Turning on the peculiarities of its facts, this case raises no question of general importance. Moreover, the narrow questions it does present were clearly decided without error by both courts below, and without creating any conflict with decisions of other courts.

It is not disputed that the granting of a continuance is a matter within the discretion of the trial court, which must necessarily be empowered to "control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis* v. *North American Co.*, 299

U. S. 248, 254. A district court's "evaluation of the parties' diligence carries almost commanding weight" see *United States* v. *Pacific Fruit and Produce Co.*, 138 F. (2d) 367, 371–372 (C. C. A. 9), and unless there has been a clear abuse of discretion, the judgment will not be reversed. See *Franklin* v. *South Carolina*, 218 U. S. 161, 168; *Avery* v. *Alabama*, 308 U. S. 444, 446; *Gilbert* v. *Lachapelle*, 127 F. (2d) 750, 751 (App. D. C.).

The record shows irresistibly that there was no abuse of discretion in concluding—as Judge Fake, Judge Smith and Judge Lederle all did—that the petitioner failed to make out a case for a continuance from the June trial date to the Fall Term of court. Some of the grounds assigned for the delay sought (the petitioner's unawareness that the issue in the case was whether the beneficial owner of the stock was I. G. Farbenindustrie, A. G., of Germany, and interference with the petitioner's preparation for trial by the respondent's various motions) were baseless in fact; others (the illness of the petitioner's private secretary and the turnover of attorneys in the office of the petitioner's counsel) were on their face inadequate; the remainder (time consumed by other engagements of the petitioner's trial counsel, and the necessity of securing testimony abroad and locating new witnesses) appear to be afterthoughts.

Since the district court had not abused its discretion in refusing the plaintiff's application for a continuance until the Fall Term, it committed no error in dismissing the case with prejudice when the pe-

titioner refused to proceed to trial. If the court had bowed to the petitioner's intransigence by permitting a voluntary nonsuit, it would have nullified its own order denying the continuance. The petitioner would have been able to take a fresh start whenever it suited his purpose, thereby obtaining the adjournment which the court properly denied. On the other hand, if the petitioner had proceeded to trial in accordance with the court's ruling, he would have preserved the right to seek redress in the appellate court by a showing that the denial of a continuance prevented him from having a fair hearing. *Gilbert* v. *Lachapelle*, 127 F. (2d) 750, 752 (App. D. C.). Moreover, under Rule 41 of the Rules of Civil Procedure, a plaintiff may no longer, as a matter of right, discontinue without prejudice once issue is joined. See *American National Bank & Trust Co.* v. *United States*, 142 F. (2d) 571, 572 (App. D. C.); *Delahanty* v. *Newark Morning Ledger Co.*, 26 F. Supp. 327, 328 (D. N. J.). Rule 41 (b) not only recognizes that dismissal with prejudice in such situations is, like refusal of a continuance, a matter within the discretion of the trial court, but explicitly provides that dismissal "for failure . . . to prosecute or to comply with . . . any order of court" operates as an adjudication upon the merits "unless the court in the order . . . otherwise specifies."

In a supplemental brief, the petitioner has made the additional contention that dismissal with prejudice upon his refusal to proceed to trial after denial of his motion for a continuance, violated the due

process clause of the Constitution. To support this contention, the petitioner must show that there was such an abuse of discretion in the application of Rule 41 as to constitute denial of a fair trial. See *Franklin* v. *South Carolina*, 218 U. S. 161, 168; *Avery* v. *Alabama*, 308 U. S. 444, 446; *Seaboard Air Line* v. *Koennecke*, 239 U. S. 352, 354. The record shows no such denial. On the contrary, it establishes that the petitioner, who himself initiated the suit, was given a most generous opportunity to present his case, but refused to go to trial at all except upon his own terms.

The circuit court of appeals was "convinced, after a careful inspection of the record, that there has been no abuse of discretion here." Six judges have thus passed upon the petitioner's contentions. The petition shows no reason for further review by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition should be denied.

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